

**AMERICAN ARBITRATION ASSOCIATION**

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In the Matter of the Arbitration	:
between	:
CITY OF PHILADELPHIA,	:
“City”	:
- and -	:
F.O.P. LODGE NO. 5,	:
“Union”	:
	X

**APPEARANCES**

**For the City**

CITY OF PHILADELPHIA LAW DEPARTMENT  
Lisa Swiatek, Esq., Deputy City Solicitor

**For the Union**

JENNINGS SIGMOND, P.C.  
Marc L. Gelman, Esq., Of Counsel

**BEFORE:** David J. Reilly, Esq., Arbitrator

## BACKGROUND

The City discharged Detective Adam O'Donnell, effective March 14, 2016. It took this action based upon a finding that he had violated Department Disciplinary Code, Conduct Unbecoming, Section 1-§026-10 by engaging in criminal conduct.<sup>1</sup> The criminal conduct involved an alleged assault upon a detainee following his release from custody on February 3, 2015.

The Union contends the City lacked just cause to discharge O'Donnell. It asks that he be reinstated to his former position with the Department and be made whole for all pay and benefits lost as a consequence of his discharge. It also requests that all references to the discharge be expunged from O'Donnell's personnel file to the maximum extent permitted by law.

The relevant facts of this case, including the areas of dispute, may be set forth succinctly.

At the time of his discharge, O'Donnell had been a member of the Department for over eight years. During his tenure, the Department awarded him commendations for valor and merit. His only prior discipline resulted from an automobile accident in the line of duty. (City Exhibit 1.)

The circumstances that led to O'Donnell's discharge arose from his interaction on February 3, 2015 with T [REDACTED] L [REDACTED], [REDACTED], following L [REDACTED] release from custody at the

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<sup>1</sup> Department Disciplinary Code Section 1-§026-10, which is contained in the parties' collective bargaining agreement, reads in full: "Engaging in any action that constitutes the commission of a felony or a misdemeanor, which carries a potential sentence of more than one (1) year. Engaging in any action that constitutes an intentional violation of Chapter 39 of the Criminal Code (relating to Theft and Related Offenses). Also includes any action that constitutes the commission of an equivalent offense in another jurisdiction, state or territory. Neither a criminal conviction nor the pendency of criminal charges is necessary for disciplinary action in such matters." (Joint Exhibit 1.)

Department's Special Victims Unit ("SVU"), to which O'Donnell was then assigned as a detective.

Lieutenant Cynthia Frye, a member of the Department's Internal Affairs Division ("IAD"), testified that on February 10, 2015, she was assigned to investigate a complaint filed by Life. According to Frye, the complaint alleged that outside the SVU's offices on the evening of February 3, 2015, L█ had been verbally abused and kicked in the leg by O'Donnell. (City Exhibit 1.)

Frye reported commencing her investigation of this matter by interviewing L█.<sup>2</sup> Her record of that interview reflects that L█ began by recounting his initial interaction with O'Donnell and Police Officer V█ C█ while being released from custody at SVU that evening. L█ stated that upon opening the cell in which he was being detained, they both directed verbal abuse and profanities at him, following which O'Donnell escorted him from the building, exiting through the rear door.<sup>3</sup> Once outside the building, he recalled, O'Donnell mentioned that there were no cameras in the area, and then made remarks suggesting he wanted to instigate a fight.<sup>4</sup> At that point, he stated, O'Donnell grabbed him by the neck and then kicked his right knee. (City Exhibit 1; Union Exhibit 6.)

According to L█ interview statement, following this kick, he fell to the ground in pain and was unable to walk. He reported that while he was on the ground crawling,

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<sup>2</sup> Although L█ was subpoenaed to testify in this matter, he failed to appear at the December 6, 2017 hearing without explanation.

<sup>3</sup> According to the record of this interview, L█ reported that C█ remarked, "Mr. L█ I don't want to see your fucking face here again or I'm going to lock your black ass up." He also related that O'Donnell, after delivering a bag containing his belongings, objected when he sought to confirm its contents, stating, "You can't look at that fucking shit in here. You have to take that shit outside." (City Exhibit 1; Union Exhibit 6.)

<sup>4</sup> L█ interview statement indicates that O'Donnell called him an "asshole" and then asked, "What do you want to do motherfucker, what are you smiling at?" (City Exhibit 1; Union Exhibit 6.)

O'Donnell ignored his statements of being in pain and issued a profanity-laced directive for him stand up. (City Exhibit 1; Union Exhibit 6.)

The statement continues by reporting that O'Donnell then left the immediate area at which time, L█ encountered three █ officers, Detectives J█ O█ and P█ M█ and Sergeant D█ O█. According to L█, although he advised them that O'Donnell had "badly injured" him, they "left [him] there" without arranging for medical assistance. (City Exhibit 1; Union Exhibit 6.)

At this point, according to his statement, O'Donnell returned to the area driving a Department vehicle. L█ reported that O'Donnell ordered him into the vehicle, stating, "I'm going to take you over to Hunting Park." He also described that in issuing this directive, O'Donnell exited the vehicle, grabbed his jacket and pulled him to his feet. After returning to the vehicle, O'Donnell drove them to an area of Hunting Park with which L█ was not familiar and then demanded he exit the vehicle.<sup>5</sup> Per his statement, unable to walk, he used his cellphone to contact his mother, who, in turn, made arrangements for his father and brother to come to his assistance. (City Exhibit 1; Union Exhibit 6.)

L█ concluded the interview by recounting the medical treatment he received at two different hospitals for his injuries, which were diagnosed as including a █ █ . (City Exhibit 1; Union Exhibit 6.) Frye subsequently obtained copies of L█ medical records and photographs depicting the injury █ . (City Exhibits 1-2.) She reported that in reviewing those records with the City's Chief Medical Examiner,

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<sup>5</sup> City Exhibit 3 is a Google Maps satellite photograph of Hunting Park and the surrounding area. Visible in the photograph is the location within the park where L█ exited the vehicle (i.e., near the roundabout and the municipal building).

Saul Gulino, M.D., he opined that L█ injuries were consistent with his allegation of being kicked in the right knee by O'Donnell. (City Exhibit 1.)

Frye testified that in continuing her investigation, she retrieved the video recorded by the interior and exterior security cameras located at the SVU building for the relevant time period. (City Exhibit 8.) In doing so, she reported learning that the security camera covering the area immediately outside the rear door, where the alleged altercation between L█ and O'Donnell reportedly took place, was not recording on February 3, 2015, and such function had been inoperable for a few months. (City Exhibit 1.)

Frye's review of the available security video, which consists of a series of clips without audio, showed: (1) L█ entered SVU at approximately 8:15 p.m., walking with a normal gait; (2) L█ exited SVU at approximately 9:45 p.m., exhibiting no apparent physical impairment; (3) L█ entered the rear parking area at SVU several minutes later by way of the driveway located immediately behind the building, at which time his gait appeared noticeably impaired and he exhibited difficulty standing; (4) L█ leaned against a concrete retaining wall, as O'Donnell stood nearby for approximately one minute before walking outside the view of the camera; (5) several seconds later, O█, M█ and O█ come into view and interact for approximately twenty seconds with L█, who is then standing; (6) approximately thirty seconds later, after the three have departed, L█ fell to the ground where he remained for two minutes before rising and exiting from the view of the camera; (7) O'Donnell reappeared driving a Department vehicle; (8) after stopping the vehicle alongside L█, O'Donnell exited and opened the rear passenger-side door through which L█ then entered the vehicle; and (9) O'Donnell

returned to the driver's seat and then drove the vehicle out of the camera's view with L█ seated in the rear of the car. (City Exhibit 8.)<sup>6</sup>

Frye reported that her investigation also included interviews of all Department personnel present at SVU during the relevant time period, as well as the officers that received L█ complaint and his father.<sup>7</sup> She related that in her interviews of O█, M█████ and O█, they each confirmed that while interacting with L█ outside SVU on February 3, 2015, he did not report having been injured or state that O'Donnell had assaulted or caused him harm. (City Exhibit 1; Union Exhibits 2-4.)

Frye noted further that her investigation revealed that O'Donnell had failed to submit any reports or other documentation regarding his encounter with L█ outside the SVU building or his subsequent transporting of L█ from SVU to another location. (City Exhibit 1.)<sup>8</sup>

Finally, Frye testified that on the basis of her investigation, she concluded that L█ allegations of being assaulted by O'Donnell were substantiated. (City Exhibit 1.)<sup>9</sup> She explained that this finding rested on the totality of the evidence collected, as well as

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<sup>6</sup> The parties stipulated to the following timeline of events on February 3, 2015: (1) 8:15 p.m., L█ was brought to SVU by the arresting officers; (2) 9:45 p.m., L█ was discharged from SVU; and (3) 10:55 p.m., O'Donnell completed his shift and departed SVU.

<sup>7</sup> L█ father, T█████ L█, was also subpoenaed to testify in this matter. He, too, failed to appear at the December 6, 2017 hearing without explanation.

<sup>8</sup> The Department's Directives governing the use of force mandate that officers document any instance in which they are required to use force in the performance of their duties. (City Exhibits 6-7.) For example, Department Directive 22 specifies that whenever an officer uses less-than-lethal force, he/she will notify a supervisor immediately, and at the supervisor's direction, complete and submit a use of force form 75-632 before the conclusion of his/her shift. (City Exhibit 7.)

<sup>9</sup> She also reported that her investigation failed to substantiate L█ allegations against O█, M█████, O█ and C█. As to the first three, she concluded that there was insufficient proof to support a finding that they were aware L█ required medical assistance and failed to respond. In the case of C█, she determined that there was a lack of credible evidence that C█ had verbally abused L█ on February 3, 2015. (City Exhibit 1.)

O'Donnell's failure to submit a use of force report or make an arrest in connection with this incident.

In testifying regarding the events of February 3, 2015, O'Donnell confirmed having had no prior interaction with L█ or any knowledge of the reason for his detention at SVU that evening. He explained that his involvement with L█ began upon witnessing his interaction with C█, as she attempted to release him from the cell in which he was being held.<sup>10</sup> He described observing L█ make an aggressive move, which caused C█ to back up to the adjacent wall while exhibiting an expression of fear.<sup>11</sup>

In response, he intervened and escorted L█ from his cell to the rear door of the unit, which opens on to a driveway. (Union Exhibit 1.) He related that in walking to the door, L█ proceeded haltingly and became argumentative, directing profanities at him to which he did not respond.

After exiting the building, O'Donnell stated that his intention was to lead L█ from the driveway located immediately outside the door to the rear parking lot. (Union Exhibit 1.) He explained that the driveway area is extremely dark at night and does not afford a view of Hunting Park Avenue. Someone unfamiliar with the location, such as L█, he stated, might not know in which direction to walk in order to proceed to the street.

According to O'Donnell, as they walked to the parking lot, L█ lunged at him with his hands raised. In response, O'Donnell described grabbing and then tripping L█,

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<sup>10</sup> O'Donnell averred that his scheduled shift that day was 3:00 p.m. – 11:00 p.m. He noted, however, that he had been in court most the day, starting at 9:00 a.m., as he was testifying in criminal trial. He also reported that he was addressing a family health issue that day, which concerned his father's ongoing cancer treatment.

<sup>11</sup> O'Donnell's workstation at SVU was located directly across from the holding cells. From there, he had a view of all five cells, as the upper half of the wall dividing the two areas is clear glass. (City Exhibit 1 & Union Exhibit 5.)

by sweeping L█ right leg with his own. He further reported holding on to L█ to minimize the force with which he hit the ground. He denied kicking L█ at any time during this encounter.

Once on the ground, L█ ceased his aggressive behavior and O'Donnell related directing him to leave the area. He recalled L█ complied. He did not remember L█ exhibiting any injuries, but acknowledged that he may have overlooked a leg injury due the odd manner in which L█ had been walking from when he left the cell.

O'Donnell recounted returning to the building following this encounter, where, a short time later, he received a report of an individual loitering in the parking lot. Believing this person was L█, he detailed again leaving the building and securing a vehicle for the purpose of transporting L█ off the property. He related stopping the vehicle alongside L█ in the parking area and directing him to get in. Once in the vehicle, he stated, L█ asked to be driven home. When he declined to do so, L█ requested a ride to the subway, which he agreed to provide.

While en route to the subway, he stated, L█ once again became belligerent. As a result, he stopped the vehicle at the roundabout in Hunting Park, which is located near the municipal building, and directed L█ to exit the vehicle. (City Exhibit 3.)<sup>12</sup>

O'Donnell recounted that after L█ had done so, he drove back to SVU, where he remained for a short time before concluding his shift. He acknowledged failing to prepare a use of force report regarding his interaction with L█. According to O'Donnell, he elected not to do so because it would have also necessitated arresting L█,

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<sup>12</sup> O'Donnell testified that from the location inside Hunting Park where L█ exited the vehicle, it would be a one or two minute walk to the Park's exterior boundary, and from there, it would be an additional one or two minute walk to the nearest subway station. He stated further that the streets located outside the Park in all directions are visible from the roundabout where L█ was standing when he stepped out of the vehicle.

which, in turn, would have required completing additional documentation and remaining at work until early morning despite his having a court appearance the next day. He stated further that his decision not to make the arrest was influenced by L█ compliance once subdued.

At the hearing in this case, C█, a thirteen-year member of the Department, also gave testimony regarding the events of February 3, 2015. In particular, she recounted her interaction with L█ that evening, as she endeavored to release him from the cell at SVU in which he was being held. According to C█, upon opening the cell, she advised L█ of his release and directed him to collect his belongings. She explained that her intention was to escort him from the cell to the building's rear exit door. She denied using any profanity or being verbally abusive to him.

She recounted that despite repeatedly directing him to exit the cell, he failed to comply, and then suddenly moved towards her in a threatening manner. As a result, she described backing up against the adjacent wall. (Union Exhibit 5.) She recalled that at this point, O'Donnell approached and offered to escort L█ from the building.

She reported that as they proceeded to the door, L█ walked very slow and hesitantly. As a result, she stated, O'Donnell had to direct him several times to move forward.

According to C█, after they had exited the building, she realized that O'Donnell would not be able to re-enter through the rear door because it locks automatically upon being closed. For this reason, she went to the door and looked outside. In doing so, she observed L█ leaning against the concrete retaining wall opposite the door and O'Donnell standing in the driveway leading to the rear parking area. Concluding that

O'Donnell would not be re-entering the building immediately, she returned to her workstation.

Addressing O'Donnell's discharge, Police Commissioner Richard Ross confirmed proceeding by a Commissioner's Direct Action. (City Exhibits 4-5.) He explained that his review of Frye's investigation report and the security video confirmed that such response was warranted. These materials, he stated, revealed that O'Donnell had engaged in serious misconduct rising to the level of criminal activity, including an assault.<sup>13</sup> He also reported that the decision to discharge O'Donnell was influenced by O'Donnell's failure to submit a use of force report accounting for his actions during his encounter with Life.

O'Donnell's discharge prompted the instant grievance. (Joint Exhibit 2.) When the parties were unable to resolve the matter at the lower stages of the grievance procedure, the Union demanded arbitration. Pursuant to the procedures of their collective bargaining agreement, the parties selected me to hear and decide this case. (Joint Exhibit 1.)

I held a hearing in this matter on December 6, 2017, at the offices of American Arbitration Association in Philadelphia, Pennsylvania. At that time, the parties each had full opportunity to present evidence and argument in support of their respective positions. They did so. Upon the conclusion of the hearing, I declared the record closed.

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<sup>13</sup> On February 17, 2016, the District Attorney for the City of Philadelphia brought criminal charges against O'Donnell based upon his actions toward L█ on February 3, 2015. The charges included: aggravated assault; simple assault; kidnapping for ransom; unlawful restraint; obstructing administration of law; and official oppression. The charge of kidnapping was dismissed following a preliminary hearing conducted on April 22, 2016. O'Donnell was found not guilty of the remaining charges on April 11, 2017, after a jury trial in the Pennsylvania Court of Common Pleas, Philadelphia County.

## DISCUSSION AND FINDINGS

### **The Issue:**

The parties have stipulated that the issues to be decided are as follows:

1. Did the City have just cause to discharge the grievant, Detective Adam O'Donnell, effective March 14, 2016?
2. If not, what shall be the remedy?

### **Positions of the Parties**

The City contends that its discharge of O'Donnell was for just cause. It maintains that the evidence conclusively demonstrates that he violated Department Disciplinary Code Section 1-§026-10, for which discharge was the appropriate penalty.

The City stresses that notwithstanding the absence of L█ testimony, there can be no dispute concerning the relevant facts. Simply put, it submits, the record substantiates that on February 3, 2015, O'Donnell assaulted L█, and then using a Department vehicle, transported him to Hunting Park, where he dumped him despite his need for medical attention.

In support, it highlights that L█ statement to Frye concerning these events does not vary significantly from the account that O'Donnell provided in his testimony here. The key difference, it notes, is that L█ reported an unprovoked assault by O'Donnell; whereas, O'Donnell recounted employing an appropriate level of force in responding to L█ aggressive behavior.

It concludes that O'Donnell's failure to file a use of force report in connection with this incident casts such doubt on his account that it must be rejected as not being credible. Indeed, it avers, the use of force report serves to avoid the very situation presented here in which an officer seeks to defend his/her use of force by offering a post

hoc explanation. It stresses in this regard that the report's purpose is two-fold; namely, ensuring the Department's integrity while safeguarding the public from harm.

Moreover, it maintains that the totality of the circumstances here offer such overwhelming support for L█ account of the events of February 3, 2017 that it compels a finding that O'Donnell assaulted him, as charged. In particular, it cites the security video as providing clear and irrefutable corroboration of L█ version of events. Indeed, it notes that this evidence is so compelling that each person in the Department's chain of command who concurred with the decision to discharge O'Donnell, as well as the District Attorney who brought criminal charges against him and the members of the City's law department who elected to settle L█ related civil law suit, all came to the exact same conclusion; namely, O'Donnell assaulted L█ outside the SVU offices on February 3, 2017.

Accordingly, for all these reasons, the City asks that O'Donnell's discharge be sustained and the grievance be denied.

The Union, on the other hand, maintains that the City lacked just cause to discharge O'Donnell based upon his interaction with L█ on February 3, 2017. The Union submits that the City has failed to meet its burden of proof in this regard.

As a preliminary matter, it asserts that the City should be held to a heightened standard of proof given the nature of the charges brought against O'Donnell. It reasons that when an employer discharges an employee for alleged misconduct that amounts to criminal activity, as is the case here, the just cause standard obligates the employer to satisfy a higher standard in substantiating those charges. Namely, the employer must demonstrate the employee is guilty of the charged misconduct beyond a reasonable

doubt, or, at least by clear and convincing evidence. It submits that considerable arbitral authority exists to support this construction of the just cause standard.

Turning to the merits, it contends that City's effort to demonstrate the credibility of L█ complaint by comparing it with the account that O'Donnell provided in his testimony here is patently invalid. The reason, it states, is simple. There is no basis to make such a comparison because L█ did not testify here. His original complaint and the statements that he made to Frye in connection with her investigation, it avers, cannot substitute for such testimony, nor can they be accepted for their truth.

It argues further that the February 3, 2017 security videos from SVU do not provide the substantiation needed to prove the City's case against O'Donnell. The videos, it stresses, do not show O'Donnell kicking L█, as has been alleged. Whatever occurred between them that evening, as they proceeded from the driveway to the rear parking area, took place outside the view of the security cameras.

Therefore, it highlights, on the record here, the only first-hand account of that interaction is O'Donnell's testimony, which recounts his appropriate and necessary use of force in responding to L█ unprovoked aggressive behavior. In addition, beyond being the only first-hand account, it submits that a review of that testimony plainly demonstrates its inherent credibility.

It contends that the same result necessarily follows in determining the circumstances of O'Donnell's actions in transporting L█ to Hunting Park. Here again, it points out that O'Donnell's first-hand testimony must be credited over L█ version of events, as related by Frye in testifying as to her investigation.

It continues that even if consideration could be given to L█ prior account, it would be due very little weight, if any. It reasons that a review of the record demonstrates that L█ credibility is extremely dubious.

In support, it points out that Frye's investigation rejected various aspects of his account of the events of February 3, 2015. In this regard, it notes, she found unsubstantiated his claim of verbal abuse by C█, as well as his accusation of having informed O█, M█ and O█ that O'Donnell had injured him, which would have obligated them to arrange for him to receive medical treatment.

In addition, it maintains that a comparison of L█ statement to Frye with the testimony he gave at the preliminary hearing and trial in O'Donnell's criminal case reveals so many serious inconsistencies as to render his account patently untrustworthy. In support, it offers a detailed review of these three accounts given by L█, pointing out numerous discrepancies. These variances, it notes, would have factored heavily into the challenge that it would have mounted to L█ credibility if he had testified at the hearing in this case and been subject to cross-examination. Those efforts, it submits, would have left L█ veracity in tatters and shown O'Donnell to be entirely truthful.

Accordingly, for these reasons, the Union asserts that its grievance should be granted and the requested relief awarded.

### **Opinion**

The City's Police Department, no doubt, has a right to expect that its officers will strictly adhere to the laws of the Commonwealth that they have sworn to uphold. Officers who breach that trust by engaging in criminal activity can and should expect that serious discipline will follow. This principle applies with particular force when an officer

commits a violent assault on a citizen in the course of performing his/her duties. Indeed, the Department's obligation to protect the public compels vigilant action when confronted with such criminal conduct.

Notwithstanding such obligation, the City still carries the burden of proof here. It must demonstrate with sufficient certainty that O'Donnell committed the charged offense. It must also establish that the level of discipline imposed is appropriate. The Union, on the other hand, has no corresponding burden. It need not disprove the charges against O'Donnell. Indeed, he is entitled to a presumption of innocence.

After a careful and thorough review of the record, I am convinced that the City has failed to meet its burden.<sup>14</sup> My reasons for this conclusion follow.

On the basis of Frye's testimony and the documentary evidence presented, I am satisfied that she conducted a thorough and complete investigation in order to determine what transpired between O'Donnell and L█ during their interaction on February 3, 2015. Nonetheless, her account of that investigation, including, in particular, her interview of L█, cannot substitute for his testimony.<sup>15</sup> Her recollection of L█'s statements regarding his encounter with O'Donnell is plainly hearsay. While hearsay is admissible in arbitration, it cannot, standing alone, be received for the truth of the matter asserted, particularly where it bears on the ultimate issue in the case. Stated otherwise, Frye's testimony and the report of her investigation are insufficient to establish that O'Donnell committed an unprovoked assault on L█, as has been charged.

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<sup>14</sup> As detailed above, the Union argues for the application of higher standard of proof here, such as beyond a reasonable doubt or clear and convincing evidence. I find that it is unnecessary to resolve this issue, as I conclude that on the record established, the City has failed to demonstrate O'Donnell's guilt by even a preponderance of the relevant evidence.

<sup>15</sup> I note that the City did endeavor to secure the testimony of both L█ and his father. Indeed, it served subpoenas on both individuals to attend and testify at the hearing in this case. However, they failed to appear without explanation. Notwithstanding those circumstances, the fact remains that Frye's account of L█'s prior statements constitutes hearsay and cannot substitute for his live testimony.

In the absence of L█ first-hand account, the balance of the City's evidence is circumstantial.

The security video presented depicts that when exiting the SVU building on February 3, 2015, L█ was walking with a normal gait, and then, several minutes later, as he came into view of one of the external security cameras, he exhibited a pronounced limp. Further, the medical reports and photographs reflect that L█ sustained an injury to the area of his █, which was diagnosed as a █.

This evidence substantiates that L█ sustained an injury to his █ during the period that he was off camera while leaving the SVU building. It does not, however, confirm how that injury occurred. Obviously, L█ first-hand account, if credible, could certainly have provided the necessary proof of causation. However, as noted, we do not have his testimony.

Nonetheless, in the absence of any plausible alternative explanation, it would not be unreasonable to infer from the circumstantial evidence presented that the injury occurred as L█ claimed. However, such is not the case here. O'Donnell testified and provided an alternate account of the interaction that took place between him and L█ on February 3, 2015.

The absence of L█ testimony, of course, does not compel the acceptance of O'Donnell's account at face value. Instead, it must be subjected to the same credibility assessment that would be conducted of any witness's testimony. In doing so, I conclude that it should be credited.

His account of the interaction between him and L█ outside the SVU building was clear, consistent and credible. He very precisely described that as they proceeded

towards the rear parking area, L█ lunged at him aggressively. In response, he subdued L█ by grabbing and then tripping him with a leg sweep. In addition, his testimony reflects that L█ behavior in this regard was part of a continuing pattern that began with his conduct toward C█ when she sought to release him from the holding cell. Namely, there too, he moved aggressively. In that instance, his threatening behavior caused C█ to back up to the adjacent wall, and triggered O'Donnell's intervention. This portion of O'Donnell's account was fully corroborated by C█ through her testimony here.

In sum, I find that O'Donnell's testimony concerning his encounter with L█ has the ring of truth. As such, I must conclude that the evidence presented does not substantiate that he assaulted L█ outside the SVU building on February 3, 2015, as charged.

I reach a similar result in assessing the evidence relating to O'Donnell's transporting of L█ from the SVU building to Hunting Park. Simply put, on the established record, I cannot find that his actions in that regard constituted the commission of a crime.

Here again, I credit O'Donnell's testimony. In recounting the relevant circumstances, he did so with precision and without equivocation. Further, it was consistent with the portion of this encounter that was recorded by the security cameras. Namely, he did not force L█ to enter the vehicle. Instead, he simply offered him transportation to facilitate his exit from the SVU property. Further, in transporting L█ from SVU to Hunting Park, he acted to accommodate L█ request to be driven to the subway station adjacent to the park. However, before they arrived there, L█ again

became belligerent, causing O'Donnell to order him to exit the vehicle near the municipal building within the park.<sup>16</sup>

As noted above, the absence of L█ testimony does not cause me to accept O'Donnell's account of these events at face value. Instead, as the foregoing reflects, I have assessed the credibility of that testimony by closely examining its substance, both standing alone and in the context of the record in total. Such review convinces me that it is trustworthy and should be credited. Indeed, it represents another facet in a continuing and consistent narrative. At each step of the way, from exiting his cell, to walking out of the building and proceeding to the parking area and finally while being driven to the subway, L█ engaged in aggressive and belligerent behavior to which O'Donnell's responses were measured and certainly not criminal.

Accordingly, for all these reasons, the Union's grievance is granted. In regard to remedy, I direct the City to promptly reinstate O'Donnell to his former position within the Department without loss of seniority. In addition, I instruct the Department to revise O'Donnell's personnel record to delete all references to his March 14, 2016 discharge to the maximum extent permitted under the governing law.

As to the matter of make whole relief, the City is directed to make payment to O'Donnell for all wages and benefits lost as a consequence of his discharge for the period from April 11, 2017 through the date of his reinstatement.

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<sup>16</sup> I note that it stands undisputed that the location within Hunting Park where L█ exited the vehicle was within walking distance of the subway station to which he had asked to be driven and afforded a view of the city streets surrounding the park. These facts are at odds with the characterization that O'Donnell acted with the intent of abandoning L█ in a remote area.

I decline to award O'Donnell back pay and benefits for the period from his March 14, 2016 discharge through April 10, 2017. In reaching this result, I find two factors compelling.

First, I take note of the City's contention that during this period, O'Donnell could not remain a member of the Department because of the criminal charges then pending against him. Notwithstanding the Union's contention that the Department could have continued O'Donnell in a modified assignment during this period, I do not consider the City's position to be unreasonable under the circumstances here.

Second, substantial weight must be given to O'Donnell's admitted, conscious failure to submit a use of force report in connection with his encounter with L█, as mandated by the Department's directive on the subject. It is true, as the Union maintains, that the Department did not charge him with violating that directive. Nonetheless, I cannot ignore that his knowing failure to file that report contributed to the Department's decision to credit L█ account and determine that he had engaged in criminal activity that warranted dismissal. Therefore, such failure is relevant and must be given due consideration in determining the make whole relief to be awarded in this case, as I have done here.

## AWARD

1. The grievance is granted.
2. The City did not have just cause to discharge Adam O'Donnell, effective March 14, 2016.
3. The City will promptly reinstate Adam O'Donnell to his former position within the Department without loss of seniority, and revise his personnel records to delete all reference to his March 14, 2016 discharge to the maximum extent permitted under the governing law. In addition, the City will make him whole for all wages and benefits lost as a consequence of his discharge for the period from April 11, 2017 through the date of his reinstatement, less all outside wages and other earnings received by him as to this period. In connection with his reinstatement, Mr. O'Donnell will not be due any back pay or back benefits for the period from his March 14, 2016 discharge through April 10, 2017. I will retain jurisdiction of this matter to resolve any dispute as to the monies to be paid to Mr. O'Donnell based on this award, including the issue of whether he satisfied his obligation to mitigate his damages.

January 16, 2018



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David J. Reilly, Esq.  
Arbitrator

STATE OF NEW YORK      )  
                                )        ss.:  
COUNTY OF NEW YORK    )

I, DAVID J. REILLY, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

January 16, 2018



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David J. Reilly, Esq.  
Arbitrator